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In the

Supreme Court of the United States

October Term, 1982

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., and ELKHART BRASS MANUFACTURING CO., INC.,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Harold T. Halfpenny
George W. Keilley
Halfpenny, Hahn & Roche
111 West Washington Street
Chicago, Illinois 60602
(312) 782-1829
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Should the "zone of interests" limitation on standing be applied to foreclose judicial review of agency action where such action is arguably detrimental to the general health, safety and welfare?
2. If the "zone" test is applicable to this class of cases, did the Court below err in applying it to the interests sought to be protected in this case?

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vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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The Fire Equipment Manufacturers' Association, Inc. and Elkhart Brass Manufacturing Co., Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (App. A, *infra*, 1a-7a) was issued on May 27, 1982, and is reported at 679 F.2d 679.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1982. (App. B, *infra*, 8a). A timely request for rehearing and suggestion for rehearing in banc was denied on July 22, 1982. (App. C, *infra*, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case in this Court contains all the names of the parties to the proceeding in the court whose judgment is sought to be reviewed except:

1. The Ansul Company, petitioner in the Court below.
2. Motor Vehicle Manufacturers Association of the United States, Inc., *amicus curiae* in support of respondent agency in the Court below.
3. Organizational Resources Counselors, Inc., *amicus curiae* in support of respondent agency in the Court below.

STATUTE INVOLVED

This petition involves a construction of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651 *et. seq.* and specifically Section 6(f) thereof which in pertinent part provides:

> "Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. . . . The determinations

of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. §655(f).

Excerpts of other relevant statutes are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

The Fire Equipment Manufacturers' Association, Inc. ("FEMA") is a trade association with a membership comprised of manufacturers of portable fire extinguishers and other fire-fighting equipment used in workplaces regulated by the Occupational Safety and Health Administration ("OSHA"). Elkhart Brass Manufacturing Co., Inc. ("Elkhart") is a manufacturer of fire-fighting equipment and a member of FEMA. (App. A, *infra*, 2a).

On September 12, 1980, OSHA amended the entire Subpart L, Fire Protection, 29 CFR Part 1910 (45 *FR* 60656) which contains occupational safety and health standards applicable to all employers under the Occupational Safety and Health Act of 1970 ("Act"). The amended standards specify the workplace fire protection measures required by all employers.

On October 30, 1980, petitioners filed a timely petition for judicial review, challenging certain portions of the amended standard. The jurisdiction of the Court of Appeals is based on Section 6(f) of the Act, 29 U.S.C. §655(f), which authorizes judicial review of OSHA standards in the court of appeals. Petitioners challenge the following changes made in the amended OSHA standards:

1. The amended OSHA standard now permits an employer to remove previously required portable

fire extinguishers from the workplace if instead a written evacuation plan is instituted. (App. A, *infra*, 2a).

2. The amended OSHA standard now permits employers to use ⅝ inch diameter garden-type hose in lieu of 1-½ inch fire hose or fire extinguishers as part of workplace fire safety equipment. (App. A, *infra*, 2a).

The basis for petitioners' challenge is that OSHA failed to give adequate notice in the rulemaking proceedings; that the amended standard is not "reasonably necessary or appropriate" to provide a safe workplace as is required by sections 2(b)(3) and 3(8) of the Act (App. D, *infra*, 10a); that the amended standard differs impermissably from existing national consensus standards of the National Fire Protection Association in violation of section 6(b)(8) of the Act (App. D, *infra*, 11a); and that the amended standard is not supported by substantial evidence in the rulemaking record considered as a whole[1] as is required in section 6(f) of the Act. (App. A, *infra*, 2a).

The danger this amended standard posed to employees was emphasized by Schirmer Engineering Corp., OSHA's own independent expert fire consultant. In its lengthy

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[1] Even OSHA concedes that "there is a need for employees to fight fires in the workplace, especially where no public fire protection service is available or where available service is inadequate." 45 *FR* 60659, col. 1. Yet incredibly the agency then permits employers to eliminate fire extinguishers from the workplace, even though employees using this equipment have extinguished *94.2 percent* of workplace fires without assistance from a public fire department. 45 *FR* 60657, col. 3.

report, Schirmer Engineering warned OSHA of the "potential hazard to employee safety if portable fire extinguishers were not provided in the workplace," and that the amended standard would "jeopardize the safety and evacuation of employees" and could "contribute to employee injury" during evacuation. The Schirmer Report is part of the rulemaking record. (Ex. 8:97)

Numerous other commenters to the amended standard expressed similar criticism and concern. If anything there was substantial evidence in the record *opposing* the amended standard. OSHA should not have ignored these expert, unbiased warnings.

Petitioners drew these defects to the attention of the Court below, and we contend that Congress intended and the general health, safety and welfare of the millions of employees in this Nation requires a ruling on the merits.

However, the Court below never reached the merits of these arguments "because we have determined that petitioners lacked standing" under the two-part test[2] announced by this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970). (App. A, *infra*, 2a). Although petitioners suffered injury-in-fact as a result of OSHA's action (App. A, *infra* 3a), the Court below ruled that petitioners failed to satisfy the "zone of interests" test.

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[2] "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, 397 U.S. at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, 397 U.S. at 153.

Accordingly, the Court concluded that "the petition must be dismissed for lack of standing." (App. A, *infra* 7a).

Petitioners file this petition for a writ of certiorari to resolve the important issue of whether the "zone of interests" test is applicable to a case involving judicial review of agency action which is arguably detrimental to the general health, safety or welfare.[3] We submit that it is not.

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[3] This case involves agency action which is arguably detrimental to the general health, safety and welfare of this Nation's employees. If judicial review of the amended standard at issue herein is not afforded, the standard is immune from challenge since the 60 day limitation period for review under section 6(f) has expired. See notes 19 and 21, *infra*.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Below Conflicts With The Law Of This Court Concerning The Class Of Cases To Which The "Zone Of Interests" Test Applies.

Any petitioner who seeks to challenge agency action must meet the Article III minima of injury-in-fact.[4] However, the "zone of interests" test has no application so as to foreclose judicial review of agency action which is arguably detrimental to the general health, safety or welfare at the instance of a petitioner injured-in-fact.

In the present case petitioners satisfy the injury-in-fact requirement (App. A, *infra*, 3a), and we assert that OSHA's amended regulation impairs the health and safety of this Nation's approximately 62 million employees from workplace fires. (App. A, *infra*, 2a, 3a, 5a). This case involves agency action arguably detrimental to the general health, safety or welfare[5] to which the Court below erroneously applied the "zone" test.

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[4] Article III requires the plaintiff to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, that the injury fairly can be traced to the challenged action and is likely to be redressed if the requested relief is granted. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99-100 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

[5] See note 1, *supra*.

This limitation on the application of the "zone" test is based on the decisions of this Court, five in number[6], in which the test was announced and has been applied. The common theme running through all these decisions is a petitioner who is requesting judicial review of agency action or legislative pronouncement which increases the petitioner's competition[7] or is otherwise adverse to petitioner's business[8], but is not *in addition* arguably detrimental to the general health, safety or welfare. As this Court expressly stated in *Data Processing* wherein the "zone" test was fashioned: "The present [case] is a *competitor's* suit." *Id.*, 397 U.S. at 152 (Emphasis in original).

This proposition also flows from the rationale expressed in *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), discussed *infra* at p. 13, grant-

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[6] *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153-156 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 164-165 (1970); *Arnold Tours, Inc.* v. *Camp*, 397 U.S. 315 (1970) (per curiam); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 620-621 (1971); *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 320-321 n.3 (1977).

[7] In *Data Processing*, *Arnold Tours* and *Investment Co. Inst.*, petitioners challenged rulings by the Comptroller of the Currency that would have allowed national banks for the first time to compete with petitioners in the sale of data processing services, travel services and investment services respectively.

[8] In *Barlow*, tenant farmers challenged a ruling by the Secretary of Agriculture which could have lessened their economic independence from their landlords and adversely affected their farming business. In *Boston Stock Exchange*, out of state stock exchanges challenged a New York securities transaction tax which could divert business from its facilities to the New York exchanges.

ing standing where the public interest demands a hearing at the instance of a person injured-in-fact by agency action.

The "zone" test was first announced in *Association of Data Processing Service Organizations* v. *Camp, supra.* There businesses which sold data processing services and their association challenged a ruling by the Comptroller of the Currency that national banks, as an incident to their banking services, may sell data processing services to other banks and bank customers. Petitioners feared new competition from national banks in the sales of these services. In a nonstatutory review case brought under section 10 of the Administrative Procedure Act[*], they argued that the Comptroller's ruling violated the National Bank Act.

Justice Douglas then set forth the two-part test by which this Court would determine the issue of standing *in such a case*: "The first question is whether the plaintiff

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[*] A nonstatutory review case is one where judicial review of agency action taken pursuant to a specific statute is not authorized by Congress within such statute, but is rather based on section 10 of the Administrative Procedure Act, 5 U.S.C. §702. (App. D, *infra*, 10a)

By contrast, a statutory review case is one where judicial review of agency action taken pursuant to a specific statute is authorized by Congress is that statute itself. *E.g., Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. at 100. Courts often confuse the two cases when deciding the standing issue. Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 Harv.L.Rev. 645, 667-668 and nn. 104-108 (1973).

No decision of this Court has applied the "zone" test to a statutory review case. The present case is a statutory review case to which, petitioners maintain, the "zone" test is not applicable.

alleges that the challenged action has caused him injury in fact, economic or otherwise." *Id.*, 397 U.S. at 152. The second question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, 397 U.S. at 153.

Subsequent decisions of this Court which applied the "zone" test are summarized below. Not one case involves a petitioner's challenge to agency action which is arguably detrimental to the general health, safety or welfare.

1. *Barlow* v. *Collins*, 397 U.S. 159 (1970). This was the companion case to *Data Processing*. Here tenant farmers challenged an amended regulation issued by the Secretary of Agriculture under the Food and Agriculture Act of 1965 which permitted tenant farmers to assign their government payments under the upland cotton program to secure their payment of cash rent for the land. Under the prior regulation such assignments were prohibited. Petitioners feared demands for such assignments from landlords which could be ruinous to their farming business and reduce their economic independence from the landlord. In a nonstatutory review case, they argued that the Secretary's action violated the Food and Agriculture Act of 1965. This Court upheld petitioners' standing under the *Data Processing* two-part test.

2. *Arnold Tours, Inc.* v. *Camp*, 397 U.S. 315 (1970) per curiam). Here travel agents challenged a ruling by the Comptroller of the Currency that authorized national banks to provide travel services for their customers. Petitioners feared new competition from national

banks in the sale of these services. In a nonstatutory review case, they argued that the Comptroller's action violated the National Bank Act. This Court upheld petitioners' standing under the *Data Processing* two-part test.

3. *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). Here several open-end investment companies and their association challenged a regulation promulgated by the Comptroller of the Currency which purportedly authorized national banks to operate collective investment funds. Petitioners feared new competition to their open-end mutual funds from national banks in the sales of investment services. In a nonstatutory review case, they argued that the Comptroller's action violated the Glass-Steagall Act of 1933. This Court upheld petitioners' standing under the *Data Processing* two-part test.

4. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). Here several out-of-state stock exchanges challenged a New York securities transaction tax which imposed a greater burden on out-of-state sales than on transactions of the same magnitude involving in-state sales. Petitioners feared that the discriminatory transfer tax would be anti-competitive, diverting business from their facilities to exchanges in New York. The state court upheld the tax as constitutional. The exchanges appealed to this Court, asserting that the tax discriminated against their business in violation of the Commerce Clause. This Court upheld the exchanges' standing under the *Data Processing* two-part test.

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No other decisions of this Court have applied the "zone" test to decide the issue of standing, though the

test has been recited as *dictum* on several occasions.[10]

Moreover, since 1970 this Court has decided a number of standing cases without even a mention of the "zone" test although arguably its application could have yielded a different result. *See, e.g., Bryant* v. *Yellen,* 447 U.S. 352, 366-368 (1980); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. at 79; *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 62-63 (1976); see also K. Davis, *Administrative Law Treatise* §22.02-11, at 348-351 (Supp. 1982).[11]

This Court's virtual non-use of the "zone" test since its formulation suggests its demise.[12] If it is still alive its idleness strongly suggests this Court's intent that the test have the *narrow* application found in the five cases where it has been used, not a *broad* application to every request for judicial review of agency action.

Any doubt as to the inapplicability of the "zone" test to review of government action which is arguably detrimental to the general health, safety or welfare was laid

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[10] *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. at 100; *Rakas* v. *Illinois,* 439 U.S. 128, 139-140 (1978); *Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976); *United States* v. *SCRAP,* 412 U.S. 669, 686, n.13 (1973).

[11] According to Professor Davis, "at least 25 Supreme Court opinions on standing since 1970 do not mention the 'zone' test even though it could be relevant to most of the opinions." *Administrative Law Treatise* §22.02-11, at 347 (Supp. 1982).

[12] Professor Davis' assessment: "The probability is that the Court has tacitly adopted the Brennan-White dissenting view in *Data Processing* that the sole test for standing should be 'injury-in-fact.'" *Administrative Law Treatise* §22.02-11, at 351 (Supp. 1982).

to rest in this Court's decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra.* There the Court upheld standing for petitioners to challenge the constitutionality of the Price-Anderson Act, which limited nuclear power plant liability for a disaster. Petitioners argued with force and logic that the limited liability could lessen a company's concern for the health and safety of people living near the facilities. This Court then stated a two-prong test for standing, with no mention of the "zone" test:

> "We . . . cannot accept the contention that, outside the context of taxpayer's suits, a litigant must demonstrate anything more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Article III." *Id.*, 438 U.S. at 79.

Similarly, the rationale of *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970) is applicable to cases such as this one where the challenged agency action is arguably detrimental to the general health, safety or welfare. In *Scanwell* a disappointed bidder challenged the Federal Aviation Association's award of a contract for instrument landing systems to be installed at airports to another contractor. Such systems are designed to make the approach of aircraft to airports *safer* for users of both. The FAA sought assurances on the safety of these systems by requiring that to qualify a prospective landing system (1) Must have been installed in at least one airport, and (2) Must have a certificate of safe performance based on an FAA flight check. *Id.,* 424 F.2d at 860 and n.1.

The FAA, however, awarded the contract to a bidder whose landing system had never been installed in an

airport, nor did it have the certificate of safe performance based on an FAA flight check. Petitioner challenged the unauthorized FAA action as a person "adversely affected or aggrieved by agency action" under section 10 of the Administrative Procedure Act, 5 U.S.C. §702.

Under the circumstances in *Scanwell*, the Court granted standing based upon injury-in-fact *alone*. For not only will persons "vindicate their very real interests," but also in such a case "the suit itself is brought in the *public interest* by one acting as a 'private attorney general'." *Id.*, 424 F.2d at 864 (Emphasis added).

The rationale in *Scanwell* of granting standing for bidders "in cases where the public interest demands a hearing," as the Seventh Circuit observed in *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service*, 658 F.2d 1182, 1193 n. 7 (7th Cir. 1981),[13] applies with equal force to this case. OSHA's action threatens the general health and safety of employees under its protection, just as surely as the FAA's decision to install a potentially unsafe landing system in airports threatened those persons under its protection.

In the past 12 years this Court's "zone" test has drawn substantial criticism, and bred confusion and divergent approaches among the lower federal courts. Each point is discussed below. The resultant confusion of the lower

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[13] The Seventh Circuit follows the *Scanwell* rule. *Airco, Inc.* v. *Energy Research & Development Administration*, 528 F.2d 1294, 1296 (7th Cir. 1975), and *Rossetti Contracting Co., Inc.* v. *Brennan*, 508 F.2d 1039, 1042 (7th Cir. 1974). Other federal circuits have also followed the *Scanwell* rationale. *William F. Wilke, Inc.* v. *Department of the Army*, 485 F.2d 180, 182-183 (4th Cir. 1973); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972).

courts is due to the lack of guidance from this Court as to whether the "zone" test is still the law; and, if so, to what types of cases is it to be applied?

A. Criticism Of The "Zone" Test Has Been Substantial.

Even as it was announced, the "zone" test drew sharp criticism from Justice Brennan who, joined by Justice White, concurred in the results of *Data Processing* and *Barlow* and dissented. Justice Brennan would have held that injury-in-fact was the only requirement for standing, and that the "zone" test was "wholly unnecessary and inappropriate" to determine standing. *Barlow* v. *Collins*, 397 U.S. at 168, 169 (Brennan, J., concurring and dissenting). The "zone" test confusingly implicates reviewability and the merits of the case:

> "The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing. Today's decisions, however, will only *compound present confusion and breed even more litigation over standing.*" *Id.* at 176. (Emphasis added).

Justice Brennan then made a predication, one that has, unfortunately, come to pass in this case and others[11]:

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[11] "The majority's blind adherence to the zone of interest test fails to consider the nature and purpose of the rule" and "the harm is not limited to this case. Such a decision creates a bad precedent which could pave the way for future situations involving possible public waste and incompetence" where an agency can ignore its own regulations, and then be accountable to no one. *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service*, 658 F.2d 1182, 1202 and 1205 (7th Cir. 1981) (Campbell, J., dissenting).

"The Court's approach does too little to guard against the possibility that judges will use standing to slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits. The Court's approach must trouble all concerned with the function of the judicial process in today's world." *Id.* at 178."

B. Lower Courts and Litigants Need Guidance As To The Proper Scope And Application Of The "Zone" Test.

This Court has an obligation to the lower courts and to litigants to declare unequivocally whether the "zone" test is extinct; or, if it is still the law, what are its contours and to what type of cases is it to be applied. K. Davis *Administrative Law Treatise* §22.02-11, at 351 (Supp. 1982). In *Copper & Brass Fabricators* v. *Dept. of Treasury*, 679 F.2d 951 (D.C. Cir. 1982), Judge Ginsburg, concurring, made this plea for assistance:

"The absence of a cogent explanation by the Supreme Court of the purpose, scope, or proper application of the 'zone of interests' test has bred confusion and

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" See also: Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 493-96 (1974); K. Davis, *Administrative Law Treatise* §22.00-3, at 711-22 (Supp. 1970). Professor Davis argues with force that the "zone of interests" test is "(1) analytically faulty, (2) contrary to much case law the Court could not have meant to overrule, (3) cumbersome, inconvenient, and artificial, and (4) contrary to the congressional intent in the Administrative Procedure Act." *Id.* at 711-19.

Later in 1976, Professor Davis asserted that the zone test was "extinct . . . . as it should [be]." Davis, *Standing, 1976*, 72 Nw.U.L. Rev. 69, 81 (1977).

> divergent approaches among lower federal courts . . . The current uncertain and uneven declarations and applications of the 'zone' test, demonstrating the insecurity lower federal courts feel in this area, will continue until the Supreme Court speaks again, and with a clear voice." *Id.* at 954 (Ginsburg, J., concurring).

In *Control Data Corp.* v. *Baldridge*, 655 F.2d 283 (D.C. Cir. 1981), the Court attempted for the first time *in 1981* to give the "zone" test "content and form, definition and scope" in the absence of more specific guidance from this Court. *Id.*, at 289, 291. In surveying the law, the *Control Data* court noted the disparate and contradictory application which the lower courts have given to the "zone" test:

> "A survey of this law reveals, however, *more variety than uniformity among the approaches to the zone test.* Some courts, reacting strongly to the Supreme Court's vague formulation of the test, have expressed disagreement with the standard[16], clearly misapplied it[17], or virtually ignored it.[18]" (Emphasis added).

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[16] See, *e.g.*, *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972). In this case the court recorded its "preference for simplifying the 'law on standing.' We think that all that is required for a plaintiff to have standing to sue for a constitutional or statutory violation is a showing of 'injury in fact.'" *Id.*, at 1212 n.4.

[17] See *Upper Pecos Ass'n.* v. *Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971), *vacated on other grounds*, 409 U.S. 1021, 93 S.Ct. 458, 34 L.Ed. 2d 313 (1972), and *Izaak Walton League of America* v. *St. Clair*, 313 F. Supp. 1312, 1316-17 (D. Minn. 1970). See also *Gibson & Perin Co.* v. *City of Cincinnati*, 480 F.2d 936 (6th Cir.), *cert. denied*, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed. 2d 473 (1973).

[18] See, *e.g.*, *Florida* v. *Weinberger*, 492 F.2d 488, 494 (5th Cir. 1974) (grant of standing to the state plaintiff

Both litigants and the lower federal courts *need* this Court's guidance and clarification. To remain silent on the proper application and scope of the "zone" test will only perpetuate the confusion that exists, and lead to additional cases which foreclose judicial review of agency action which is detrimental to the general health, safety or welfare."

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[19] (Continued)

solely on the basis of its "clear interest . . . in the manner in which the Medicaid program is administered vis-a-vis its citizens and in being spared the reconstitution of its statutory program. . ."), *William F. Wilke, Inc.* v. *Department of Army of United States*, 485 F.2d 180 (4th Cir. 1973) (grant of standing to a disappointed bidder for a government contract without mentioning the zone standard).

[19] An argument closely-related to the issue of general health, safety or welfare, is that Congress did not intend that the "zone" test be applied to a statutory review case under the OSHA Act. "Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one who otherwise would be barred by prudential standing rules." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 100 citing *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

Congressional intent under the Act is clearly to create in Section 6(f) a broad right of pre-enforcement judicial review of an OSHA safety standard, at least where such standard is set *too low* (*i.e.*, inadequate employee protection). Where a safety standard is set too low, once the 60 day period for judicial review has expired the standard is *immune from any judicial review*. This is such a case.

This is not necessarily the result where the safety standard is set *too high*. Here an employer who fails to achieve the standard may challenge its validity during a subsequent OSHA enforcement proceeding as being set too high. This challenge can be made long after 60

II. The Decision Of The Court Below Conflicts With The Law Of This Court Concerning The Proper Application Of The "Zone Of Interests" Test.

The Court below ruled that petitioners "met the threshold requirements of injury-in-fact," the first part of the two-part test in *Data Processing*, based on our interest in the sale of fire-fighting equipment. (See "Second Interest," *infra*.). This then brought the Court to apply the zone of interests test.

In this case "the interest sought to be protected by the complainant" can be summarized as follows:

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[19] (Continued)

day limit has expired. *Marshall* v. *Union Oil Co. of California*, 616 F.2d 1113, 1117 (9th Cir. 1980).

On the other hand, a standard that is set too low will *never* be challenged as such during an enforcement proceeding by an employer who fell below the standard. The employer's only argument in defense is that the standard should be even lower, not higher.

Petitioners agree with the Court below that the "paramount purpose of the Act is to provide the Nation's employees with a safe place to work." (App. A, *infra*, p. 4a, n. 4). This being established, Section 6(f) cannot, consistent with the Act, be interpreted to deny standing to a petitioner injured-in-fact who at the pre-enforcement stage challenges a safety standard as one set too low—realistically, this is the *only* opportunity to question the validity of an inadequate standard. Standing to the broadest extent permitted by Article III is what Congress clearly intended as a check on safety standards of wide application in our Nation and of tremendous importance to employee safety.

First Interest - Petitioners' interest in OSHA standards that adequately protect employees in event of workplace fires. (App. A, *infra*, 2a)

Second Interest - Petitioners' interest in the sale of fire-fighting equipment. (App. A, *infra*, 2a)

Third Interest - Petitioner FEMA's interest in promoting workplace fire safety and the development of standards that provide adequate fire protection. (App. A, *infra*, 5a)

Each interest asserted by petitioners must be examined to determine:

> ". . . whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing Service* v. *Camp*, 397 U.S. at 153.

We submit that the Court below erred in ruling: (A) that the First Interest, clearly within the zone of interests to be protected by the Act, could not be asserted by petitioners; and (B) that the Third Interest is not *arguably* within the zone of interests to be protected by the Act.

A. The Court Below Erred In Ruling That Petitioners, Having Been Injured-In-Fact, Could Not Then Assert Their Interest In Adequate Workplace Fire Safety Standards.

The Court below ruled that the First Interest is without question within the zone of interests to be protected

by the Act.[20] However, petitioners were barred from asserting it because the Court below did not believe "that manufacturers or trade associations are the most effective advocate of employee interests." [21]

To bar our assertion of the First Interest, the Court below relies erroneously on a phrase from *Warth* v. *Seldin*, 422 U.S. at 499:

> ". . . the plaintiff *generally* must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, 422 U.S. at 499 (Emphasis added).

and fails to consider the reason for applying the rule:

> "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance. . ." *Id.*, 422 U.S. at 500.

This case does not involve any "abstract questions of wide public significance" necessitating the application of the prudential limitation stated in *Warth*. Nor does the "zone" test itself require that "the interest sought to

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[20] "It cannot be disputed that the interests the Act seeks to protect are the interests of employees in securing safe working conditions." (App. A, *infra*, 4a).

[21] Whether "most effective" or not, petitioners are the *only* advocates that can challenge the OSHA fire regulations. Judicial review is now barred by 29 U.S.C. §655(f), which requires a review petition be filed in the Court of Appeals within 60 days following promulgation of a regulation. This period expired on November 11, 1980 for the regulation at issue herein.

Moreover, a person that is financially injured by agency action can be expected to vigorously challenge such action, and may be the only person having a sufficient stake in the outcome to seek judicial review. *E.g.*, *FCC* v. *Sanders Radio Station*, 309 U.S. 470, 477 (1940).

be protected by the complainant" be an interest *personal* to the complainant; the test only requires that the asserted interest be arguably within the zone of interests to be protected or regulated by the statute. Finally, this Court has recognized the right of a person injured-in-fact to then assert the rights and interests of others where specific, concrete questions are presented.[22]

Petitioners, injured-in-fact by the agency action, do have "such a personal stake in the outcome of the controversy as to assure" the concrete adverseness required to assert the First Interest. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). It was error to rule otherwise.

B. The Court Below Erred In Ruling That FEMA's Organizational Interest In Adequate Workplace Fire Safety Standards Was Not Arguably With The "Zone Of Interests" To Be Protected By The Act.

One of petitioner-FEMA's organizational purposes is to promote workplace fire safety by urging adoption of

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[22] Professor Davis writes that the *Warth* passage on third party rights and interests is contrary to prevailing law. "In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), physicians who asserted no interest of their own were allowed standing to assert constitutional rights of patients. A school challenged a statute by asserting constitutional rights of parents and children. Pierce v. Society of Sisters, 268 U.S. 510 (1925). A seller of contraceptives may challenge a regulatory statute by asserting constitutional rights of purchasers. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services International, 431 U.S. 678 (1977). So may a seller of beer. Craig v. Boren, 429 U.S. 190 (1976)." *Administrative Law Treatise*, §22.10-2, at 365 (Supp. 1982); see *also*: Davis, *Administrative Law Treatise* §§22.05-22.07 (1958).

adequate fire protection standards. (App. A, *infra*, 5a). In pursuit of this purpose, FEMA commenced this action against OSHA, challenging the agency's amended regulations as inadequate workplace fire protection standards. This is the Third Interest "sought to be protected by the complainant."

The Court below noted that "FEMA's objectives may be consistent with the goals of the Act, but this does not entitle them to standing." (App. A, *infra*, 5a). This conclusion is based on the following sparse, and defective, reasoning:

> "Section 6(f) of the Act was not intended to provide trade associations with a forum for expounding their views on what is required to maximize employee safety. Preserving the right of a trade association to promote their objectives [which, in FEMA's case, are *consistent with* the goals of the Act] is not an interest within the zone protected by the Act." (App. A, *infra*, 5a).

This ruling was an error of law. We believe FEMA's purpose and interest in promoting workplace fire protection by urging adoption of adequate fire protection standards *is* "arguably within the zone of interests to be protected" by the Act.

The legislative history for Section 6(f) of the Act clearly reflects a conscious choice by Congress to *grant*, not deny, associations a broad right to obtain judicial review of OSHA standards.[23]

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[23] In enacting section 6(f) of the Act, Congress purposely chose to give a broad opportunity for judicial review of OSHA standards. Senator Williams, the sponsor of S.2193 which ultimately became the OSHA Act, explained the legislative intent:

Moreover, the proper focus of the "zone" test is on the *interest* sought to be protected, not on the person asserting it. *Control Data Corp.* v. *Baldridge, supra,* at 293-294 and n.19. A review of the Act shows an undeniable interest in the promulgation of sound OSHA safety and health standards—the same interest which FEMA asserts in the present suit. The Court must examine the language of the relevant statutory provisions, pertinent regulations and the legislative history "to discern the paramenters of the relevant zone of interest to be protected or regulated and to determine whether the interest of [FEMA] arguably falls within the zone." *Peoples Gas, Light & Coke Co.* v. *U.S. Postal Service,* 658 F.2d at 1195.

We think FEMA's interest is without question within the "zone of interests" to be protected by the Act. The Act, like FEMA, expresses an interest in and concern for sound OSHA standards.[21] To protect this interest

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[22] (Continued)

> "This [section 6(f)] is a very broad-scaled judicial review *protection* that completely meets any industry concerns regarding the ability to contest the standards in court." 116 Cong. *Rec.* 37340, Nov. 16, 1970 (Emphasis added).

The breadth of section 6(f) (as opposed to a narrower provision in S.4404 which was rejected) was necessary, according to Senator Williams, to help alleviate this problem: ". . . *trade associations* and the giant corporations, having an abundance of legal manpower, would monopolize the right of review and thereby deny small employers and companies their day in court." *Id.,* at 37340. (Emphasis added).

[21] The Act authorizes OSHA to promulgate occupational safety and health standards that are "reasonably necessary or appropriate to provide safe or healthful

in sound standards, Congress included, to again quote the Act's sponsor, the "judicial review *protection*" found in Section 6(f) of the Act. 116 *Cong. Rec.* 37340, Nov. 16, 1970 (Emphasis added).

The interest in sound OSHA standards is one FEMA asserts and is within the zone of interests to be protected by the Act. The Court below erred in ruling to the contrary.

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[24] (Continued)

employment and places of employment." 29 U.S.C. §§651(b)(3), 652(8). These standards are the cornerstone of the Act, providing a means of measuring, and thus assuring, workplace safety compliance.

Congress exhibits a great concern that OSHA adopt valid safety standards for the Nation's 62 million workers in 6 million workplaces. Section 6 indicates a congressional desire that OSHA listen to the experts in the private sector who have the broad view and expertise needed to develop sound safety standards. 29 U.S.C. §655. Thus, the initial safety standards promulgated by OSHA had to be national consensus safety standards or established Federal standards. 29 U.S.C. §655(a). When OSHA proposes any change to these initial safety standards, the proposal is subjected to a rigorous notice and public comment rulemaking process; any change must be justified by substantial evidence; and any change may not deviate from private-sector national consensus safety standards unless the deviation would better effectuate the purposes of the Act. 29 U.S.C. §655(b).

To assure that OSHA discharges these important standard-setting obligations Congress provided for oversight of OSHA's conduct, through judicial review of any standard promulgated, by a *broad* scope of petitioners, but within a *limited* period of time. 29 U.S.C. §655(f). With this mechanism Congress sought to achieve crisp judicial scrutiny by those persons suffering an injury-in-fact and possessing a personal stake in the outcome of the controversy.

CONCLUSION

The lower federal courts have issued conflicting interpretations on the class of cases and circumstances in which this Court requires application of the "zone of interests" test to determine standing to sue. This Court has never applied the "zone" test to foreclose judicial review of agency action which is arguably detrimental to the geneal health, safety or welfare at the instance of a person injured-in-fact. The petition for a writ of certiorari should be granted to give the lower federal courts the guidance they have requested on this basic issue, and to preserve judicial review as a necessary check on health and safety-related government action.

Respectfully submitted,

HAROLD T. HALFPENNY
GEORGE W. KEELEY
HALFPENNY, HAHN & ROCHE
111 West Washington Street
Chicago, Illinois 60602
(312) 782-1829
Counsel for Petitioners

October 19, 1982

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2541

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., et al.,

Petitioners,

v.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for Review of an Order from the Occupational Safety and Health Administration

ARGUED FEBRUARY 25, 1982—DECIDED MAY 27, 1982

Before SWYGERT, *Senior Circuit Judge*, CUDAHY, *Circuit Judge*, and SHADUR, *District Judge*.*

SWYGERT, *Senior Circuit Judge*. The petitioners in this case, Fire Equipment Manufacturers' Association, Inc. (FEMA), the Ansul Company (Ansul), and the Elkhart Brass Manufacturing Co., Inc. (Elkhart), challenge certain portions of a final standard which the

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, is sitting by designation.

Occupational Safety and Health Administration (OSHA) issued on September 12, 1980, amending Subpart L, Fire Protection, 29 Code of Federal Regulations § 1910. FEMA is a trade association which represents manufacturers of fire-fighting equipment. Ansul and Elkhart are manufacturers of fire-fighting equipment, including fire extinguishers and 1½ inch hose, and are members of FEMA. The amended regulations which petitioners challenge permit an employer (1) to choose between two safety options (the deployment of portable fire extinguishers throughout the workplace or the institution of a written evacuation plan) and (2) to use ¾ inch diameter booster hose in lieu of 1½ inch hose or fire extinguishers as part of the workplace's fire safety equipment.

The essence of petitioners' challenge is that OSHA failed to give adequate notice in the rulemaking proceedings, the new standards are not appropriate to provide a safe workplace, the standards differ impermissibly from a national consensus standard and OSHA's decision to issue the standards is not supported by substantial evidence. It is unnecessary for us to reach the merits of these arguments because we have determined that the petitioners lack standing.

Section 6(f)[1] of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§ 651 *et seq.*, provides for judicial review for "(a) person who may be adversely affected by a standard issued under this section . . . ." The petitioners contend that they have been adversely affected by the new regulations for the following reasons: (1) the new regulations will result in reduced protection for employees in their workplaces; (2) as manufacturers of fire extinguishers and 1½ inch hose, the petitioners will suffer lost profits; (3) as an association promoting workplace safety, FEMA's objectives have been impaired; and (4) as employers, Ansul and Elkhart will suffer a competitive disadvantage by choosing to provide more safety to their employees through the use of fire extinguishers and greater diameter hose. The contentions will be considered separately.

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[1] 29 U.S.C. § 655(f).

I. Employee Safety

Article III of the United States Constitution requires that a party seeking to invoke the court's jurisdiction must have a personal stake in the outcome of the controversy. *Baker v. Carr*, 369 U.S. 186, 204 (1962). A plaintiff must generally assert his own legal rights and interests, not those of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them.

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80 (1978). The petitioners in the instant case do not have standing based on their allegation that employees have suffered a loss of workplace protection. This claim involves the interests of a third party; we do not believe that manufacturers or trade associations are the most effective advocate of employee interests.

II. Lost Profits

Petitioners argue that the option involving fire extinguishers and greater diameter hose is the more expensive of the two options provided for by the new standard. Employers considering which option to use in their workplace will choose the less expensive option and as manufacturers of fire extinguishers and greater diameter hose, the petitioners will suffer lost profits. This alleged injury does not suffer from the same fatal deficiency as their allegation of reduced employee safety. In claiming lost profits the petitioners are asserting their own rights and interests and have met the threshold requirement of injury-in-fact. There are other nonconstitutional limitations on standing, however, which must be applied in this case. The interests which the petitioners claim must be "arguably within the zone

of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).[2]

To determine the parameters of the relevant zone-of-interest to be protected, we must "examine the language of the relevant statutory provisions, the pertinent regulations, and the legislative history . . ." of the Act. *Peoples Gas, Light & Coke Co. v. U.S. Postal Service*, 658 F.2d 1182, 1195 (7th Cir. 1981). Section 2(b)[3] of the Act states that the purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." The legislative history of the Act reaffirms this: "The purpose of [the Act] is to reduce the number and severity of work-related injuries . . . ." [1970] U.S. Code Cong. & Ad. News 5177. It cannot be disputed that the interests the Act seeks to protect are the interests of employees in securing safe working conditions.[4] To achieve this purpose, the Act authorizes the Secretary of Labor to promulgate standards of workplace safety and further authorizes the Secretary to compel employer compliance with the standards. See 29 U.S.C. §§ 655, 657-59.

Manufacturers, as employers, do have an economic interest within the "zone of interests" regulated by the statute insofar as the Act contemplates a system of

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[2] The petitioners argue that the "zone of interest" test should not be applied to the Occupational Safety and Health Act. They base this argument on the breadth of section 6(f) of the Act. We disagree. In *Association of Data Processing Service Organizations, supra*, the Supreme Court applied the test to a clause of the Administrative Procedure Act very similar to section 6(f). *Id.* 397 U.S. at 353. Further, in *Peoples Gas, Light & Coke Co., supra*, 658 F.2d at 1193, we noted that this circuit consistently requires satisfaction of the zone-of-interest test for standing.

[3] 39 U.S.C. § 651(b).

[4] Nothing in the pertinent regulations dissuades us from our conclusion that the paramount purpose of the Act is to provide the Nation's employees with a safe place to work. *See* 29 C.F.R. §§ 1900-2400.

employer obligations for the benefit of employee safety and health. The petitioners, however, are not claiming that they, as employers, have been adversely impacted by their obligation to comply with the new regulations.[5] Rather, the petitioners' claim is that the new regulations will result in lost profits to them as manufacturers. The profits of manufacturers of fire-fighting equipment are not within the zone-of-interests protected or regulated by the Act. Petitioners' claim of standing based on lost profits must fail.

III. Organizational Objectives

FEMA maintains that it has standing because it is an association whose purpose, according to its by-laws, is promoting workplace safety and this objective has been adversely affected by the new final standards. FEMA's objectives may be consistent with the goals of the Act but this does not entitle them to standing. Section 6(f) of the Act was not intended to provide trade associations with a forum for expounding their views on what is required to maximize employee safety. Preserving the right of trade associations to promote their objectives is not an interest within the zone protected by the Act. FEMA's contention is really a backhanded attempt to assert the interest of employees, a third party. As discussed above, this interest must be asserted by the employees themselves or their representatives.

IV. Competitive Disadvantage

Elkhart and Ansul argue that they will suffer a competitive disadvantage as a result of the new regulations. The basis of this argument is that as conscientious employers concerned with employee safety, they would

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[5] Employers can usually gain standing from their economic interest in being forced to comply with the amended regulations (*e.g.*, the petitioners could claim that the cost of compliance with the regulations is too high). In this case, however, the new regulations give employers an option and petitioners cannot allege an injury from one of the options where they can choose another which causes them no injury.

choose the safer, more costly option. Less conscientious employers will choose the less costly option which does not adequately protect employees. Thus Ansul and Elkhart will suffer a competitive disadvantage because of their concern for employee safety. The two petitioners insist that eliminating competitive disadvantages which reduced employee safety was one of the interests sought to be protected by the Act. In support of this contention, Ansul and Elkhart cite the legislative history of the Act:

> Although many employers in all industries have demonstrated an exemplary degree of concern for health and safety in the workplace, their efforts are too often undercut by those who are not so concerned. Moreover, the fact is that many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety, and survive competitively, unless all are compelled to do so.

[1970] U.S. Code Cong. & Ad. News 5180. This legislative history and pertinent sections of the Act make it clear that the function of final standards promulgated by the Secretary of Labor is to protect employees by putting employers at an appropriate competitive baseline.[6] Congress did not intend to protect employers from competitive disadvantage and any benefit employers receive in the way of relief from competition is "wholly incidental to the purpose and design of the program." *Dialysis Centers, Ltd. v. Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981), quoting *Geriatrics, Inc. v. Harris*, 640 F.2d 262, 265 (10th Cir. 1980), *cert. denied*,

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[6] The Act was not intended to eliminate all competitive disadvantages. A conscientious employer can always exceed the obligations imposed on him by the Act and choose safer and more costly fire-fighting equipment for the benefit of his employees. For example, if the regulations require a fire extinguisher every ten feet in the workplace, an employer could always place them every five feet, and thus suffer a "competitive disadvantage" for the sake of employee safety. The "injury" to the employer in this hypothetical situation arises not from an adverse impact of the regulation but from the choice of the employer to exceed the minimum requirements.

..... U.S. ..... (1981). If Ansul and Elkhart claim their injury is competitive disadvantage, they have not satisfied the zone of interest test.[7] If they claim they are injured because the competitive baseline is too low, *i.e.*, the competitive baseline reduces safety below an acceptable level, Ansul and Elkhart are again asserting the interests of employees, a third party. Although we applaud the intention of employers genuinely concerned with their employees' safety, we cannot allow employers to litigate employee interests under the Act.

The petitioners in this case have not been "adversely affected by a standard" issued under the Act. The petition must be dismissed for lack of standing.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] In *Rental Housing Assoc. of Greater Lynn, Inc. v. Hills*, 548 F.2d 388 (1st Cir. 1977), the First Circuit held that a competitive injury to an association of landlords was within the zone of interests protected by the Housing and Community Development Act, 42 U.S.C. § 1437(f). The court specifically found that landlords were the intended, though not the primary, beneficiaries of the Act. In the instant case, employees are the intended beneficiaries of the Act; employers are not an intended secondary beneficiary.

APPENDIX B

Opinion by Judge Swygert

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 27, 1982.

Before

Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MILTON I. SHADUR, *District Judge**

No. 80-2541

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., et al.,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for Review of an Order from the Occupational Safety and Health Commission.

This cause came on to be heard on the record from the Occupational Safety and Health Commission, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition for review in this matter be, and the same is hereby DISMISSED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
July 22, 1982.

Before

Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. MILTON I. SHADUR, *District Judge**

No. 80-2541

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., et al.,

Petitioners,

vs.

F. RAY MARSHALL, Secretary of Labor, United States Department of Labor, and DR. EULA BINGHAM, Assistant Secretary of Labor for Occupational Safety and Health, United States Department of Labor,

Respondents.

On Petition for Review of an Order from the Occupational Safety and Health Commission.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the industry petitioners, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX D

(Statutory Appendix)

Administrative Procedure Act

Section 10, 5 U.S.C. §702

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. • • •

Occupational Safety and Health Act of 1970

Section 2(b)(3), 29 U.S.C. §651(b)(3)

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources— . . . (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce . . .

Section 3(8), 29 U.S.C. §652(8)

> For the purposes of this Act—. . . (8) the term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

Section 6(b)(8), 29 U.S.C. §655(b)(8)

Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reason why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

Section 6(f), 29 U.S.C. §655(f)

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

Office-Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-680

In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

CHARLES I. HADDEN
SHELLEY D. HAYES
Attorneys

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether, under the facts of this case, petitioners have standing to challenge the validity of the Secretary of Labor's occupational safety and health standards regulating fire protection in the workplace, pursuant to Section 6(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(f).

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-680

FIRE EQUIPMENT MANUFACTURERS' ASSOCIATION, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 679 F.2d 679.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8a) was entered on May 27, 1982. A petition for rehearing was denied on July 22, 1982 (Pet. App. 9a). The petition for a writ of certiorari was filed on October 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 ("the OSH Act"), 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). To this end, in

May 1971, the Secretary of Labor promulgated occupational safety and health standards regulating fire protection in the workplace; employers were required to comply with these standards. See 36 Fed. Reg. 10601 *et seq.* (1971). On September 12, 1980, after extensive rulemaking proceedings, the Secretary amended the fire protection standards. See 45 Fed. Reg. 60656 *et seq.* (1980).

Pursuant to 29 U.S.C. 655(f), petitioner Fire Equipment Manufacturers' Association, Inc. ("FEMA"), a trade association representing manufacturers of fire-fighting equipment, and petitioner Elkhart Brass Manufacturing Co., Inc. ("Elkhart"), a manufacturer of such equipment and a member of FEMA, petitioned the court of appeals to review certain provisions of the amended standards (Pet. App. 1a-2a).[1] The particular standards petitioners challenged "permit an employer (1) to choose between two safety options (the deployment of portable fire extinguishers throughout the workplace or the institution of a written evacuation plan) [29 C.F.R. 1910.157(b)] and (2) to use ⅝ inch diameter booster hose in lieu of 1½ inch hose or fire extinguishers as part of the workplace's fire safety equipment [29 C.F.R. 1910.157(d)]" (Pet. App. 2a).[2] Petitioners alleged that the new regulations adversely affect them in four ways (*ibid.*): (1) the new regulations will result in reduced protection for employees in their workplaces; (2) as a manufacturer of fire extinguishers and 1½ inch hose,

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[1]Ansul Company, a third petitioner in the court of appeals, did not join in the petition for a writ of certiorari.

[2]Petitioners asserted that the Secretary failed to provide the public with adequate notice of his proposed amendments, that the revised standards are not appropriately protective, that the new standards differ impermissibly from national consensus standards relating to fire protection, and that the determination to issue the challenged standards is not supported by substantial evidence (Pet. App. 2a).

Elkhart will suffer lost profits; (3) as an association promoting workplace safety, FEMA's objectives have been impaired; and (4) as an employer, Elkhart will suffer a competitive disadvantage by choosing to provide more safety to its employees through the use of fire extinguishers and greater diameter hose.

2. The court of appeals dismissed petitioners' claims. As to the assertion that employees have suffered a loss of workplace protection, the court held that petitioners lack standing because "[t]his claim involves the interests of a third party" and the court did not consider petitioners "the most effective advocate of employee interests" (Pet. App. 3a).

The court further held that petitioners lack standing under *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), to raise the other interests asserted, because they are not arguably within the "zone of interests" protected or regulated by the OSH Act (Pet. App. 3a-7a). First, the court held that maintaining the level of manufacturers' profits is outside not only "the interests of employees in securing safe working conditions," but also the cognizable economic interests of employers in having to pay for compliance with OSHA requirements (*id.* at 4a-5a). Second, the court ruled that "[p]reserving the right of trade associations to promote their objectives is not an interest within the zone protected by the Act" and that FEMA's assertion of an "interest" in promoting workplace safety "is really a backhanded attempt to assert the interest of employees" (*id.* at 5a). Finally, the court concluded that Congress did not intend to protect against the competitive disadvantage to employers who provide more protection than the standards require (*id.* at 5a-7a). Because any relief from competition that might occur is "wholly incidental" to the purposes of the OSH Act, the court held that petitioners' last asserted interest also is outside the zone.

ARGUMENT

Both constitutional requirements and prudential considerations limit a party's standing to challenge administrative action in the courts. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) ("*Valley Forge*"). Article III of the Constitution requires a party to show that it was injured in fact by the action. See *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 151-152 (1970) ("*Data Processing*"). Quite apart from this, traditional rules of judicial self-restraint require that a party must generally "assert [its] own legal rights and interests, and cannot rest [its] claim to relief on the legal rights or interests of third parties" (*Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)), and also that a party's claim must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing, supra*, 397 U.S. at 153. Because the court of appeals correctly applied these principles in holding that petitioners lack standing to challenge OSHA's revised fire protection standards, and because this case presents no novel application of these principles, review of the decision below is unwarranted.

1. Petitioners contend (Pet. 19-25) that the court below erred in evaluating their standing to raise two interests that they allege are adversely affected by the new standards and are within the "zone of interests" protected by the OSH Act — their interest in adequate protection for employees and FEMA's interest in promoting its organizational objectives. As to neither of these interests, however, do petitioners have the personal stake in the outcome of the controversy that Article III requires. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The only "injury-in-fact" that petitioners cite (Pet. 19), and the only one the court of appeals expressly recognized (Pet. App. 3a), is the harm to fire equipment manufacturers' profits that allegedly will result from employers'

compliance with the revised standards. However, the court below held that this interest is not within the "zone of interests" protected by the Act (*id.* at 4a-5a), and petitioners do not challenge that determination here. Accordingly, petitioners should not be permitted to rely on the loss of profits claim as a basis for asserting "injury-in-fact."

As to petitioners' remaining claims, the court of appeals correctly observed (Pet. App. 3a) that it is the safety of employees, not of fire equipment manufacturers or their trade association, that is at risk if the Secretary has promulgated standards that are not sufficiently protective. Moreover, as this Court's decisions make clear, FEMA's "interest" in the problem of fire safety cannot substitute for the concrete injury required by the Constitution. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39-40 (1976); *Sierra Club* v. *Morton*, 405 U.S. 727, 736-741 (1972).[3] Indeed, FEMA's attempt to assert its

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[3]In *Simon*, several individual indigents and organizations sued the Secretary of the Treasury and the Commissioner of Internal Revenue, asserting that the Internal Revenue Service had violated the Internal Revenue Code and the Administrative Procedure Act by issuing a revenue ruling allowing favorable tax treatment to a nonprofit hospital that offered only emergency room treatment to indigents. 426 U.S. at 28. The Court held that "the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal * * * [and that] [i]nsofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail." *Id.* at 39-40.

In *Sierra Club*, an organization, one of whose "principal purposes * * * is to protect and conserve the national resources of the Sierra Nevada Mountains" (405 U.S. at 735 n.8), sought a declaratory judgment and an injunction to restrain federal approval of an extensive recreational development in those mountains. *Id.* at 728-730. The Court held that the Sierra Club's "special interest" in the problem was not a sufficient injury in fact. *Id.* at 738-740. Otherwise, the Court noted, any group or individual citizen could allege a "special interest" and, in effect, bypass the Article III limitations. *Id.* at 739-740.

"organizational interest" was, in the court of appeals' words, "really a backhanded attempt to assert the interest of employees" (Pet. App. 5a). The association simply has no real personal stake in the controversy.

2. At all events, petitioners cannot surmount the prudential barriers to their standing.[4] First, petitioners' claim that the new safety standards result in a loss of workplace protection for employees "involves the interest of a third party" (Pet. App. 3a), which petitioners may not assert. *Warth* v. *Seldin, supra,* 422 U.S. at 499. Although there are exceptions to this general rule (see *Singleton* v. *Wulff,* 428 U.S. 106, 114-118 (1976) (plurality opinion)), none applies here, since there is no genuine obstacle to the employees' assertion of their own rights. See *id.* at 115-116 (plurality opinion); *McGowan* v. *Maryland,* 366 U.S. 420, 429-430 (1961). Any union or individual employee could have sought review pursuant to 29 U.S.C. 655(f) during the 60-day period prescribed for such review; the fact that none did so suggests that employees and their representatives may affirmatively have determined not to assert these rights. In these circumstances, as the court of appeals stated, petitioners are "[not] the most effective advocate of employee interests" (Pet. App. 3a). See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 80 (1978).[5]

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[4]The Administrative Procedure Act, 5 U.S.C. 702, which permits any person "adversely affected" by agency action to seek judicial review, does not alter the basic rules of standing. See *Valley Forge, supra,* 454 U.S. at 487-488 n.24. In *Data Processing, supra,* the Court applied the "zone of interests" test in an APA review action. Since the OSH Act, like the "broadly remedial" APA (*Data Processing, supra,* 397 U.S. at 156), allows "adversely affected" persons to seek judicial review, there is, contrary to petitioners' assertion (Pet. 9 n.9), no reason to believe that the prudential rules are to be applied any differently in the context of the former statute.

[5]Petitioners argue (Pet. 21 n.21) that they "are the *only* advocates that can challenge the OSHA fire regulations" because judicial review under 29 U.S.C. 655(f) was not sought by any other party within 60 days

Second, the court of appeals correctly held that petitioner FEMA's interest in promoting its organizational objectives is outside the "zone of interests" protected or regulated by the OSH Act. The Act's stated purpose is to assure safe and healthful working conditions for every employee and to preserve human resources. 29 U.S.C. 655(b). It achieves that purpose by regulating the conduct of employers, requiring them to comply with OSHA standards and to provide a workplace free from recognized hazards. 29 U.S.C. 654(a). Nowhere does the statute "[p]reserv[e] the right of trade associations to promote their objectives" (Pet. App. 5a), even if those objectives happen to be consistent with the OSH Act's goals.

Petitioners argue (Pet. 23-25), however, that the judicial review authorization in 29 U.S.C. 655(f) is broad enough to encompass their "organizational objectives" interest. In support of this argument, they rely on legislative history indicating that Congress contemplated that trade associations would utilize the statute's "judicial review protection" (Pet. 23-24 n.23, quoting 116 Cong. Rec. 37340 (1970) (remarks of Sen. Williams)). But nothing in the legislative history suggests that trade associations may do anything more than represent their members in a proceeding for judicial review with respect to interests regulated by the OSH Act. Like the "giant corporations, * * * small employers and companies" (*ibid.*) that may judicially challenge OSHA standards with which they must comply, trade associations may challenge regulations that impose compliance

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following promulgation. But "[t]he assumption that if [a party] ha[s] no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). In any event, any dissatisfied union or employee may still petition the Secretary for modification of the current standards pursuant to 29 U.S.C. 655(b)(1). Thus, employees may still assert their rights under the OSH Act to safe and healthful working conditions.

obligations on their members. See, *e.g., Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607 (1980) (trade association petitioned on behalf of its members for review of OSHA's standards regulating occupational exposure to benzene).

Petitioners also contend (Pet. 12-18) that the "zone of interests" test is no longer the law, or that, at the least, it is inapplicable to review of government action that is arguably detrimental to the general health, safety, or welfare. Just last Term, however, this Court reaffirmed the test's vitality as a prudential limitation on standing without any hint that it should receive the limited application petitioners suggest. See *Valley Forge, supra,* 454 U.S. at 475. See also *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 100 n.6 (1979). In *Data Processing,* where the Court first articulated the "zone of interests" test, it recognized that standing may stem from "aesthetic, conservational, and recreational," as well as economic, injuries. 397 U.S. at 154. Thus, application of the test does not turn on abstract consideration of the *type* of interest asserted, but on whether that interest is within the range of interests that Congress sought to protect in the particular statute involved.

Moreover, careful reading of the cases on which petitioners rely undermines their claim that the courts have imposed a health, safety, or welfare limitation on the "zone of interests" test. Thus, the passage petitioners quote (Pet. 13) from *Duke Power Co.* v. *Carolina Environmental Study Group, Inc., supra,* 438 U.S. at 79, does not mention the test because there the Court was discussing whether the plaintiff had satisfied the "case or controversy" requirement of Article III, not any prudential limitations on standing. Furthermore, as the District of Columbia Circuit has recently noted, *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F.2d 859 (D.C. Cir. 1970) (also cited by petitioners (Pet. 13-14)), was a pre-*Data Processing* case, and standing in that case turned

on the plaintiff's status as a "disappointed bidder" for a government contract, not on the fact that airport safety was involved. See *Control Data Corp.* v. *Baldrige*, 655 F.2d 283, 292-293 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981). Petitioners' proposed limitation of the "zone of interests" test must accordingly be rejected.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

MARY-HELEN MAUTNER
Counsel for Appellate Litigation

CHARLES I. HADDEN
SHELLEY D. HAYES
Attorneys
Department of Labor

DECEMBER 1982

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[6]Petitioners contend (Pet. 16-18) that review is necessary because lower courts have not applied the test in a consistent fashion. But none of the cases cited by petitioners construes the OSH Act; thus, this is a case of first impression. Moreover, petitioners have not shown that the interpretation of the "zone of interests" test adopted by any other circuit would be likely to produce a different result in this case.

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